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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

THOMAS HEDDEN,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI
With Appendix

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68 pp

QUESTIONS PRESENTED

This petition presents the question of whether a Motion for Voluntary Dismissal under F.R.C.P. 41 (a) must be granted upon the plaintiff's request in a case arising under the Federal Employers Liability Act, 45 U.S.C. § 51, where no legal prejudice will inure to the defendant thereby, and the plaintiff will suffer substantial prejudice in the preparation and presentation of his case in chief if the Motion for Voluntary Dismissal is denied, which question was answered in the negative below, so departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

LIST OF PARTIES

The petitioner is Thomas Hedden. The respondent is the National Railroad Passenger Corporation, doing business as Amtrak.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

THOMAS HEDDEN,
Petitioner
v.
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas Hedden petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit filed May 12, 1996 (App. 18a) was not published. The Order of the United States District Court for the Eastern District of Pennsylvania denying Plaintiff's Motion for Voluntary Dismissal, filed March 14, 1996, (App. 27a) was not published.

JURISDICTION

The Judgement of the Court of Appeals was entered on May 13, 1996. (App. 25a).

The jurisdiction of this Court is invoked under 28 USC § 1254(1).

The provisions of federal law involved herein include Federal Rule of Civil Procedure 41 (a) which provides in pertinent part that:

> **Rule 41. Dismissal of Actions**
> **(a) Voluntary Dismissal: Effect Thereof.**
> **(1) By Plaintiff; by Stipulation.**
> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party

of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATEMENT OF THE CASE

Petitioner Thomas Hedden, plaintiff/appellant below, was injured on August 11, 1992, while pulling a heavy railroad tie from a bed of gravel and mud underneath a railroad track rail during the course and scope of his employment with the defendant/appellee, National Railroad Passenger Corporation. At the time of his injury, Mr. Hedden was being assisted by only one co-worker, Barry Bauer, and these two gentlemen were tugging on the heavy railroad tie with a pair of tie tongs, a large plier-type tool. While struggling to pull this tie out from beneath the rail, the plaintiff sustained a very severe back injury which required surgery, and caused him to miss over one year from work.

At the time of plaintiff's injury, he was assigned to work with only one other individual, despite the fact that there were nearly 20 other men working in the rail gang that day. The assignment of the men was done by Mr. Hedden's foreman, Joseph Byrne. Mr. Byrne had the discretion to use 4-man teams to perform this work, but elected to do it with 2-man teams. There further were machines available in the area where plaintiff was employed which could be used to aid in this task, however, Mr. Byrne's supervisor, Joseph Hoffman, did not make the equipment available to the crew on the day in question. It was Amtrak's position that 2-man teams were a customary and therefore reasonably safe way to perform this job.

Suit was filed on behalf of Mr. Hedden, seeking recovery under the Federal Employers Liability Act, 45 U.S.C. §51, et seq.[1] During the course of discovery, plaintiff submitted interrogatories and requests for production of documents to the defendant, to which defendant filed answers following a Motion to Compel Discovery filed by the plaintiff. Included was the following request, accompanied by the defendant's answer:

> **Interrogatory No. 65:** "Is the defendant aware of the application of any American Association of Railroads specifications, studies, complaints or recommendations to the activities of the plaintiff at the time of the incident in suit? If so, please describe this defendant's understanding of any such applicable specifications. If not, please state any investigation or inquiry undertaken by this defendant at any time to determine the applicability of said specifications.
>
> **Answer:** To be supplied, if any. The FRAMW-1000 track maintenance standards require the renewal of cross-ties which have become

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[1] A complaint was initially filed in the Court of Common Pleas of Allegheny County, Pennsylvania, where jurisdiction over the defendant could be obtained, and venue was appropriate pursuant to 45 U.S.C. § 56, which provides that an FELA case may be brought in any location where the defendant does business. After the plaintiff was notified of the defendant's objections to this venue as inconvenient (the injury having taken place in eastern Pennsylvania, not western Pennsylvania), the plaintiff voluntarily dismissed this first action, and refiled this case in the United States District Court for the Eastern District of Pennsylvania.

deteriorated or unsafe in order to maintain and compliance with federal standards."

The American Association of Railroads, or AAR, is a trade organization funded by the railroad industry which performs research, lobbying and training on behalf of its member railroads, including Amtrak. Plaintiff's interrogatory was obviously intended to see if the AAR had placed the defendant on notice of any dangers associated with the type of work that the plaintiff was performing at the time of his injury, so as to establish the defendant's negligence herein. The track standards referenced by the defendant are irrelevant to this suit, and defendant otherwise disclosed the existence of no other relevant materials. After plaintiff's receipt of these Answers to Interrogatories from the defendant in June of 1994, discovery closed pursuant to order of court in July of 1994.

Several months following the close of discovery, but more than 8 months prior to trial, plaintiff's counsel uncovered, in connection with unrelated litigation against a different railroad, that the American Association of Railroads had issued an "Ergonomics Guide" and had conducted an ergonomic workshop regarding "low back pain and manual material handling" in October of 1990, approximately two years before Mr. Hedden was injured. The Ergonomics Guide listed "ergonomic guide workshop attendees", and specifically named Daniel Sheehan, Superintendent of Safety, Field Operations for National Railroad Passenger Corporation (P. 12a, 11a). During the course of this

workshop, as indicated in the referenced materials, the issues of back injuries resulting from manual activities was discussed, accompanied by ways to determine whether or not jobs were being done in a safe manner, and how such risks could be avoided by the railroad. For example, page 1.1.2 (App. 28a) indicated that the employer can determine whether or not workers are at risk of injury by assessing things such as:

> "Do workers use lifting postures that deviate from a near upright standing posture when performing a lift, push or pull activity?
>
> Do lifts, holds, carries, pushes or pulls require more force than could be comfortably supplied by one hand?
>
> Do workers lift or carry objects that are bulky or require grasps that are not close to the body and near waist level?
>
> Are lifts, pushes or pulls performed using rapid or jerking body movements?
>
> Are exertions performed when standing or walking on uneven or potentially slippery surfaces?"

All of these describe activities that were present in the plaintiff's job, and, on the face of these materials, would be relevant to determining whether or plaintiff's job was placing him at risk of injury, such that it should have been corrected. Where the defendant was, on the face of these materials, specifically made aware of these risks several years prior to the plaintiff's injury, and yet failed to consider or implement the AAR's

recommendations, such information would have direct and critical relevance to the plaintiff's case in establishing negligence on the part of this defendant in connection with this matter, and yet the existence of these AAR documents was hidden by the defendant.

Upon uncovering this material, plaintiff moved the trial court for enlargement of the discovery period in order to permit the plaintiff to pursue further discovery regarding this matter to (1) authenticate the material with the defendant; (2) establish those individuals employed by the defendant to whom this information had been distributed, and (3) discuss its application by the defendant. Without this discovery, the plaintiff would be unable to use the previously hidden document at trial, because it could not be authenticated, and the plaintiff could not by the mere existence of the document show the defendant's knowledge of its contents prior to the plaintiff's injury. Nevertheless, by order dated January 11, 1995, the lower court denied plaintiff's motion. Promptly thereafter, without undue delay, on February 21, 1995, plaintiff filed a Motion for Voluntary Dismissal. This motion asserted plaintiff's continuing need for the discovery with regard to the newly uncovered evidence, which plaintiff felt was of such importance that he was willing to discontinue his action in order to permit him to pursue this line of inquiry. The court, however, by order dated March 14, 1995, denied plaintiff's motion, imposing the trial court's assessment of what it believe the plaintiff's trial strategy should be, indicating that it believed plaintiff to be complicating a straightforward FELA case. Apparently the judge felt that the plaintiff should just tell the jury that he got hurt at work, and that he thought he needed help, and the jury would shower a generous recovery on the plaintiff for his losses, regardless of the strength of plaintiff's proof of the defendant's liability.

Following denial of plaintiff's Motion for Voluntary Dismissal, this matter proceeded to trial by jury on May 30, 1995. The jury returned a verdict with special interrogatories on

June 1, 1995, indicating that they did not find the defendant to be negligent. As such, the jury did not consider the issues of causation and damages. On appeal of the district court's denial of plaintiff's Motion to Enlarge Discovery and denial of plaintiff's Motion for Voluntary Dismissal, the Third Circuit affirmed the trial court's rulings.

ARGUMENT

1. The District Court Erred in Denying Plaintiff's Motion for Voluntary Dismissal Where the Plaintiff Advanced a Significant Need for the Dismissal, Proceeded with Due Diligence and Where the Defendant Would Not Be Unduly Prejudiced.

Plaintiff's Motion for Voluntary Dismissal should have been granted by the District Court, based upon the record. In reviewing the denial of a Motion for Voluntary Dismissal, the reviewing court can reverse the ruling if the District Court abused its discretion. In this case, the trial Court's denial of voluntary dismissal was such an extreme departure from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory powers.

Pursuant to F.R.C.P. 41(a)(2), an action may be dismissed at the plaintiff's request "upon order of the court and upon such terms and conditions as the court deems proper". The purpose of Rule 41(a)(2) is to prevent voluntary dismissals which would be prejudicial to the defendant by permitting imposition of curative conditions as the court deems necessary. Alamance Industries v. Filene's, 291 F.2d 142 (1st Cir. 1961). As noted in Moore's Federal Practice,

> "While the basic purpose of Rule 41(a)(2) is to allow a plaintiff to dismiss an action without prejudice to future litigation, the dismissal must not unfairly jeopardize the defendant's interest. Accordingly, a dismissal should in most cases be granted, unless the result would be to legally harm the defendant. . . It has been often said that a dismissal without prejudice should be allowed unless the defendant would suffer some prejudice other than the mere prospect of a second lawsuit.

> That the plaintiff may obtain some tactical advantage by dismissal is insufficient grounds for denial of the motion; substantial prejudice should be the test." 5 Moore's Fed. Pract. ¶ 41.05(1).

Accord; In Re: Paoli Railroad Trans. PLB Litigation, 916 F.2d 829 (3rd Cir. 1989). The court may, and ordinarily will, allow voluntary dismissal upon such appropriate terms and conditions as it deems necessary. Selas Corp. of America v. Wilshire Oil Company of Texas, 57 F.R.D. 3 (Ed. Pa. 1972). Voluntary dismissal is to be liberally granted. Yoffe v. Keller Industries, 580 F.2d 126 (5th Cir. 1978). In addition, a plaintiff under the FELA is accorded this protection by Congress as a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Sinkler v. Missouri and Pacific R. Co., 356 U.S. 326, 785 S.Ct. 758, 762 (1958). In FELA cases, the railroad employee is to be given the benefit of every doubt. Ratigan v. New York Central R. Co., 291 F. 2d 548, 553 (2nd Cir., 1961), (citing Harris v. Pennsylvania R. Co., 361 U.S. 15, 80 S. Ct. 22 (1959). The FELA is remedial legislation, intended to be liberally construed to favor, not thwart, employee rights. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443 (1952). Thus, an order granting voluntary dismissal upon request of the plaintiff is the accepted and usual course of procedure under the rules, not the exceptional instance. Moreover, it is within the province of the court to determine and impose such curative conditions on the dismissal as it may deem necessary to protect the defendant from undue prejudice.

Prejudice. What constitutes "Prejudice" sufficient to deny a plaintiff his right to voluntary dismissal? Certainly not the mere fact that pretrial discovery has taken place. It cannot be seriously contended that Rule 41(a)(2) was only meant to be

utilized in the short period immediately surrounding this initiation of the action. Instead, Rule 41(a)(1) encompasses "early" dismissals, while Rule 41(a)(2) anticipates the circumstance where after a case is developed, the plaintiff encounters an obstacle that must be sidestepped. Similarly, simply because the plaintiff filed an action in the state court previously cannot be a bar to voluntary dismissal. In this case, plaintiff dismissed the state court action at defendant's request, despite the state court action being properly brought in that venue under 45 U.S.C. § 56, because the defendant felt that Allegheny County, Pennsylvania (Pittsburgh) was "inconvenient". Can this be held against the plaintiff? Finally, litigation efforts and expenses of routine nature are not the type of prejudice meant to bar dismissal. Such expenses are present in all dismissals, for which the rule allows imposition by the court of "terms and conditions" on the dismissal. These factors thus may all guide the terms of dismissal, but cannot entirely bar its entry.

Instead, to bar a Rule 41(a)(2) voluntary dismissal, it is legal prejudice that a defendant must be exposed to. For example, if the defendant would lose the effect of a bar to the claim based on expiration of the state of limitations, legal prejudice would exist. Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989). Where, however, the defendant is not exposed to any legal prejudice, but instead only to typical burdens of delay or expense, dismissal with allowance of curative conditions must be the proper course.

Herein, as set forth above, plaintiff sent discovery requests to the defendant seeking disclosure of information which the defendant may have obtained from the AAR which would be relevant to the underlying action. The Association of American Railroads is an industry trade organization which funds research and lobbying activities for the railroad industry. The defendant is a member of the Association of American Railroad, and in response to plaintiff's interrogatory, did not file any objection or

qualification, but instead indicated that such materials were "to be supplied, if any". Defendant's responses, however, made no reference to the "AAR Ergonomic Guide" or similar materials from the AAR. On or about May 27, 1994, plaintiff's counsel fortuitously discovered the AAR Ergonomic Guide in connection with unrelated litigation pending against the Norfolk and Western Railway. On its face, this document states that Dan Sheehan, employed by the Respondent Amtrak, was a "reviewer" of the ergonomic guide (A. 38), while separately it indicated that Dan Sheehan, as Superintendent of Safety, Field Operations was an attendee at such an ergonomic guide workshop in 1990 (A.39). As discussed above, the contents of the ergonomic guide are relevant to assessing the safety of the plaintiff's job, i.e., whether or not it is safe for two individuals to lift, tug and drag a heavy railroad tie. It is clear that this material should have been disclosed in response to plaintiff's interrogatory, and was not. For current purposes, it is not necessary to rule upon whether or not the failure to disclose was a sanctionable discovery violation. More important, however, is the simple fact that it was not disclosed, and should have been.

Upon finding this information, plaintiff applied to the District Court to extend discovery, enlarging the time frame so as to permit the plaintiff to pursue deposition testimony regarding the full import of these materials, the distribution of them within Amtrak and to obtain expert evaluation of these materials as applied to plaintiff's case. Without further discovery, even the bare authentication of the materials was impossible. Nevertheless, despite all of the above facts being before the District Court, the court denied plaintiff's application to enlarge time, claiming that the action was a very simple straight forward FELA case, implying that this discovery was not necessary. In light of the strategy of the defendant at trial (i.e., implying that the customary method was safe), plaintiff's counsel believed there to be a need for the exploration of this material in order to strengthen plaintiff's case-in-chief. Following the denial of

plaintiff's Motion to Enlarge Discovery, plaintiff had promptly moved for voluntary dismissal. As the statute of limitations on the underlying claim had not expired (and in fact still had not expired through the time of the jury's verdict), plaintiff submits to this Honorable Court that the requested dismissal without prejudice was proper, and its denial was an extreme abuse of judicial discretion. The District Court, however, denied plaintiff's application, failing to set forth adequate reasons for so doing, and in fact indicating that it had imposed upon the plaintiff the burden of specifying what curative conditions would be appropriate, where such a duty does not exist under law. American Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963).

In filing the Motion for Voluntary Dismissal, plaintiff exhibited no improper motive, unless a desire to fully and adequately develop the case based upon the issues framed during discovery can somehow be considered improper. The defendant would have suffered no legal prejudice associated with the dismissal which would be sufficient to deny plaintiff's request. The discovery which had been done in the underlying action would be equally applicable to any subsequent action. The time and expenses expended similarly would be directly applicable to any later proceeding. Moreover, where the need for the dismissal was caused by the defendant's own failure to disclose information in response to plaintiff's discovery requests, the insignificance of any prejudice becomes clear. This is especially true when balanced against the importance of the underlying material to the plaintiff. Where, as here, a plaintiff has discovered tangible information which points directly to discoverable information which is of substantial importance to the plaintiff's claim of negligence, it is improper and manifestly unfair to reward the defendant's failure to disclose this material by denying the plaintiff an opportunity to pursue it. Under such circumstances, it was impossible for the plaintiff to authenticate documents, establish defendant's knowledge of the documents,

and obtain necessary testimony to apply such information to the case at hand. This is precisely the situation contemplated by Rule 41, and yet the court denied the plaintiff relief.

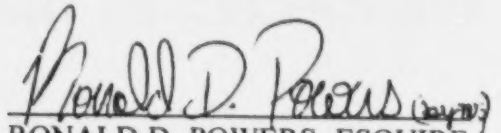
The prejudice suffered by the plaintiff is evident from the jury's verdict. The plaintiff argued at trial that the defendant should have known that the method being used was unsafe. The defendant argued that this was the manner in which it customarily performed these acts, and as such was safe. Under such facts, the jury did not find negligence. If, however, the plaintiff had been to establish that the customary way in which the defendant directed this work to be done had been shown to be unsafe several years previously, as documented in materials contributed to by Amtrak, then certainly the result may have been different.

Plaintiff submits that the District Court abused its discretion in denying plaintiff's Motion for Voluntary Dismissal under the circumstances, which denial worked substantial prejudice to the plaintiff's ability to obtain and present evidence of defendant's negligence at trial. Plaintiff requests this Honorable Court grant this Petition for Certiorari, and upon review to reverse the lower court's denial of voluntary dismissal, and remand this action for further proceedings.

CONCLUSION

As the denial of plaintiff's Motion for Voluntary Dismissal was an extreme departure from the accepted and usual course of judicial proceedings, plaintiff respectfully requests that this Honorable Court grant this petition for Certiorari.

Respectfully submitted,
ROBERT PEIRCE AND ASSOCIATES



RONALD D. POWERS, ESQUIRE
Counsel for Appellant

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1535

THOMAS P. HEDDEN,
Appellant,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION
Appellee,

APPEAL FROM ORDERS ENTERED ON 1/12/95, 3/14/95 AND 6/1/95 OF THE UNITED STATE DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA CIVIL No. 93-5640
DISTRICT JUDGE: HONORABLE LOWELL A. REED, Jr.

Submitted Under Third Circuit LAR 34.1(a)
May 9, 1996

Before: GREENBERG, ALITO and McKEE, Circuit Judges
(Filed May 13, 1996 1995

MEMORANDUM OPINION OF THE COURT

McKee, Circuit Judge

Plaintiff appeals from a final verdict in favor of defendant, National Railroad Passenger Corporation, in the United States District Court for the Eastern District of Pennsylvania. Plaintiff contends (1) that the district court erred in denying his request to enlarge discovery, (2) in denying his motion for voluntary dismissal under F.R.C.P. 41(a) (2), and (3) in excluding evidence relating to the failure of an employee of the defendant to report the accident. For the reasons stated below, we will affirm the rulings of the district court.

I.

On August 11, 1992, Thomas Hedden allegedly suffered a severe back injury while working for defendant when he attempted to remove a railroad tie from under a bed of gravel. Several hours later Hedden reported the accident to his supervisor, Joseph Hoffman. The next day, Mr. Hedden came to work but Hoffman only assigned him light duties. Thereafter Hedden went on unpaid sick leave. However, Hoffman allegedly filled out Hedden's time card for the first few days of Hedden's sick leave so that Hedden was able to receive several extra days of pay. Hedden alleges that Hoffman failed to report the accident for several days in violation of defendant's procedures. Hedden alleges that Hoffman eventually contacted Hedden's wife in an attempt to get her to "work with him" (Hedden) and avoid the filing of a suit.

On March 25, 1993, Hedden filed a suit against the National Railroad Passenger Corporation under the Federal Employers Liability Act in the Court of Common Pleas of Allegheny County. However, he later voluntarily dismissed the case after the defendant sought dismissal. On October 25, 1993, Hedden re-filed the suit in the District Court for the Eastern District of Pennsylvania, and that court thereafter issued a Case Management order listing a discovery cutoff date of May 30, 1994. During discovery, Hedden served an interrogatory which asked whether "the defendant was aware of the application of any American Association of Railroads specifications, studies, complaints or recommendations to the activities of the plaintiff at the time of the incident of the suit." The defendant answered "to be supplied, if any."

During this time there existed an "Ergonomics Guide," (the "Guide") issued by the American Association of Railroads. The Guide listed one of defendant's employees as a reviewer for the Guide. The parties dispute whether the Guide would have any relevance to the case. Hedden claims his counsel first discovered the Guide in October of 1994 after the close of discovery. Hedden then asked the district court to enlarge discovery so that he could pursue further discovery regarding the Guide. The district court denied that motion by order dated January 11, 1995. Hedden then moved for a Voluntary Dismissal under F.R.C.P. 41(a) (2) again so that he could pursue further discovery regarding the Guide. The district court also denied this motion, and the suit proceeded to trial. Hedden did not introduce the Guide at trial. During the trial, the district court sustained the

defendant's objection to the admission of any evidence relating to Hoffman's failure to report Hedden's accident and Hoffman's purported attempts to avoid litigation. On June 1, 1995, the jury found for the defendant on the issue of negligence. This appeal followed.[1]

II.

Appellant's first argument is that the district court erred when it denied his request to extend discovery. The district court has broad discretion in conducting discovery and its decisions will only be disturbed upon showing an abuse of discretion to the degree that the court's actions "made it impossible to obtain crucial evidence." Wisniewski v. John-Manville Corp., 812 F.2d 81, 90 (3rd Cir. 1987). Hedden alleges that the defendant's failure to disclose the existence of the Guide constituted a breach of its duty to respond to his interrogatories and thus justifies his request to extend the discovery period. However, appellant has made no showing that the refusal to extend discovery precluded him from obtaining crucial evidence. Hedden had the Guide at least six months before trial and thus had ample opportunity to investigate it. Hedden's only claim to prejudice is his asserted inability to depose defendant's employees about the Guide. Under these circumstances, we cannot say that the district court abused its discretion in refusing to enlarge discovery.

III.

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[1] Jurisdiction is pursuant to 28 U.S.C. § 1291.

Hedden's second argument is that the district court erred when it refused to grant a voluntary dismissal under F.R.C.P. 41(a) (2). After a defendant has filed an answer to the complaint or filed for summary judgement, a plaintiff's ability to voluntarily dismiss a claim without prejudice is subject to the discretion of the trial court, F.R.C.P. 41 (a)(2) , and we will only reverse where that discretion is abused. Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3rd Cir. 599 1991). Normally, the district court should allow a plaintiff to dismiss the claim unless the dismissal would result in "plain legal prejudice" to the defendant. Cone v. West Virginia Paper Co., 330 U.S. 212 (1947). Thus, the court must "weigh the relevant equities and do justice between the parties in each case." McCants v. Ford Motor Co. Inc., 781 F.2d 855 (11th Cir. 1986). In doing so, the court considers factors such as the extent to which the trial has progressed, the effort and expense incurred by defendant, the duplicative expense of a second litigation, and the plaintiff's diligence in bringing the motion. Maleski v DP Realty Trust, 162 F.R.D. 496 (E.D. Pa. 1995). Here, the case had previously been filed in state court and voluntarily dismissed by the plaintiff. The case was then re-filed in federal court, but there was a period of a year and three months where defendant had engaged in discovery, retained an expert witness, prepared for trial, and prepared summary judgement motions, pre-trial memoranda, motions in limine and answers to plaintiff's motions. It is thus clear that the defendant would suffer prejudice had the district court allowed yet another voluntary dismissal this far into the litigation. Thus, we do not think that the district court abused its discretion in denying the motion for voluntary dismissal.

IV.

Hedden's final argument is that the district court erred in excluding evidence that his supervisor, Hoffman, failed to report the accident as required under the defendant's own procedures and in excluding any evidence that Mr. Hoffman was trying to persuade Hedden not to file a suit. Appellant argues that he would be entitled to a negative inference as to defendant's liability from Hoffman' s actions. The admission of such evidence usually requires the district court to balance the probative value of the evidence against its prejudicial effect under Federal Rule of Evidence 403. *Id.* at 786. Trial court rulings on the admission of evidence and Rule 403 balancing are reviewed for an abuse of discretion. Glass v.Philadelphia Elec. Co., 34 F.3d 188, 191 (3rd Cir. 1994).

Here, Hoffman's actions could possibly be seen as an effort to cover the defendant's culpability and hence be relevant, but the evidence is as likely to show an innocent effort by Hoffman to enable Hedden to collect a few days more pay and to avoid the problems of a law suit. Moreover, even if the jury concluded that Hoffman was concerned about his employer's negligence - a stretch under these circumstances - **Hoffman's belief** that the defendant may have been liable is not relevant to the jury's task. Given the tenuous (at best) relevance of this evidence, we can not conclude the district court abused its discretion in keeping it out.

Furthermore, although not addressed by the parties, Federal Rules of Evidence 408 and 409 prohibit introduction of evidence regarding efforts to settle matters out of court and the payment of medical and other similar expenses occasioned by an injury. Hoffman's alleged efforts to avoid litigation may well be entitled to the protection of these rules.

V.

For the reasons stated above, we will affirm the judgement of the district court.

TO THE CLERK:

Please file the forgoing opinion.

/s/
Lowell A. Reed, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1535

THOMAS P. HEDDEN,
Appellant,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION
Appellee,

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on May 9, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the Order of the District Court entered on March 14, 1995 be and the same is hereby affirmed.

Costs taxed against appellant.

/s/
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Thomas P. Hedden,	)	
	)	
v.	)	Civil Action
	)	No. 93-5640
National Railroad	)	
Passenger Corporation	)	

ORDER

AND NOW, this 11th day of January, 1995, it is hereby Ordered that Plaintiff's Motion for Extension of Discovery Deadline is hereby Denied.

/s/
Lowell A. Reed, Jr.
U.S. District Judge

Date Entered: 1-11-95

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Thomas P. Hedden,	)	
	)	
v.	)	Civil Action
	)	No. 93-5640
National Railroad	)	
Passenger Corporation	)	

ORDER

AND NOW, this 13th day of March, 1995, upon consideration of plaintiff's motion for voluntary dismissal (Document No. 24), and the response of the defendant thereto, and for the reasons set forth in the opposition and opposition brief of defendant and having found that the plaintiff has failed to show favorable terms under which his request for approval of his voluntary dismissal may be conditioned, it is hereby ORDERED that the motion is DENIED.

Date Entered: 1-11-95

/s/
Lowell A. Reed, Jr.
U.S. District Judge

AAR ERGONOMIC GUIDE

UNIT 1
LOW-BACK PAIN & MANUAL MATERIALS-HANDLING

TRAINING MATERIALS: Overhead Slides, Speakers Notes, and Class Exercises

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Acknowledgments

We gratefully acknowledge the following individuals who carefully critiqued these materials in our first workshop on this subject. We have tried to implement their recommendations where possible. Through their assistance we feel this product will better serve the railroad industry.

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Steve Kenyon	Union Pacific Railroad
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Terry Terrill	Association of American Railroads

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October 18th and 19th, 1990

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Introduction

Benefits of Applying Ergonomic Principles

Proper application of ergonomic principles in job, equipment, and workplace design produces win-win results for workers and management by reducing:

* worker accidents, injuries, and associated lost work
* absenteeism and turnover,
* medical and claims costs,
* poor performance, productivity, and quality of work.
* employee dissatisfaction and morals problems.

Perhaps the earliest documented case of the beneficial application of ergonomic design principles comes from the annals of World War II. Aircraft accident and aircrew injury and death rates increased significantly with the introduction of high-performance military aircraft. Aircrews were faced with poor cockpit display and control design and layout. Pilot confusion led to the inappropriate selection and incorrect operation of controls. Poor control and Instrument panel designs stressed the pilots' abilities to quickly won, read, Interpret, and respond appropriately to different situations. Now designs for controls and displays were identified following a careful design review

and experimentation. These now designs more closely matched the mental and physical capabilities of pilots. improved pilot performance, and significantly reduced aircraft accident rates and associated personnel and equipment losses.

A more recent application of ergonomic principles has significantly reduced the incidence and cost of low-back injuries in the railroad industry. Torso injuries (low-back pain) account for about 27% of all lost-time injuries in the railroad industry. To reduce the incidence, severity, and costs of low-back injuries, one railroad implemented a comprehensive injury control program consisting of the following activities:

* identifying and evaluating potentially stressful job tasks using a biomechanical model,
* redesigning those tasks that were found to be unacceptably stressful,
* implementing a warm-up stretching program directed by the local supervisor that consisted of simple stretching exercises performed for 15 minutes, two times each work day, and
* providing an educational program that focused on the mechanics of lifting, the body's response to stressful lifting, and lifting techniques and strategies that minimize stress in the back.

The incidence of reported lost time injuries, including low-back injuries, fell dramatically at job sites where this

program was initiated. At one particular railroad car repair facility, lost work days fell from 579 in 1985 to 0 in 1988. Productivity at this facility increased from 1564 to 2900 cars repaired during the same four-year period. And the value of car repairs at the shop increased from $8.9 million in 1985 to over $12 million In 1988. Based on the cost to implement the injury control program, the railroad calculated a benefit-to-cost ratio of approximately 10 to 1.

Poor or inadequate application of ergonomic principles the design of the job, workplace, or tools used inhibits worker productivity or quality of performance and increases injury or health risks. One does not have to look far to find the following and other ergonomic problems in American industry today:

* Absence of proper tools. This can lead to the construction of poorly designed makeshift devices, or unintended use of nearby tools.
* Awkward body postures that must be used when performing manual work or visual inspection tasks due to poor workplace, tool, or job design.
* Tasks that require repetitive flexing or twisting motions of the hands and wrist.
* High levels of sustained noise or sudden impact noise. These can produce temporary hearing loss and directly interfere with oral communication.
* Lifting and carrying of objects that have no handles or are difficult to grasp and control.
* Missing or overly worn labels on control or display

panels. This can lead to confusion when operating equipment, or when operators are not highly experienced.

* Power tools that expose the hands and wrists to significant vibration, low temperature, and forces.
* Uneven or low lighting levels that can make visual tasks more difficult, time consuming and prone to error.

Such occurrences limit worker performance due to localized or wholebody fatigue and discomfort, or increase perceptual or decision making errors in task performance. Task errors not only increase the risk of accidents, but reduce industry profitability due to the additional labor time required for error diagnosis and subsequent task rework.

Purpose of the Guide

Whenever people perform work, use equipment, machinery, or tools. ergonomic problems may arise. These problems may be magnified by the requirements of the task(s) or by the environments in which the task(s) are performed. Usually, modifications to machinery, toots, equipment, tasks, or environmental conditions can reduce or eliminate ergonomic problems and their consequences. Unfortunately, ergonomic problems are not always .obvious. In such cases, one needs specialized information to help Identify, describe, evaluate, and develop technically and economically rational remedies.

This guide has been developed to provide safety, health, and engineering professionals with sufficient knowledge and tools to put ergonomic principles to work in an efficient and effective manner. The guide will help you identify, evaluate, and resolve ergonomic problems and thereby improve safety, health, and productivity.

Successful ergonomic programs draw upon the perspectives, training, experiences and support of all stakeholders shown in Figure 2 and described in greater detail in Table 1.

Human-machine and environmental Issues addressed by the guide include:

* illumination and visual task design
* noise in the workplace
* design of controls and displays
* human computer interface.

The Guide provides the following information for each of the above ergonomic problems or issues:

* A job analyst checklist. This will help the analyst identify potentially stressful job, task, or equipment Issues that require further analysis and, perhaps, control.

* A concise overview of pertinent technical and scientific literature. This will provide the job analyst with a review of ergonomic issues in safety, health, and

performance. This review provides specific information concerning: a) the prevalence of the problem, b) anatomical, physiological, or psychological bases of the problem, and c) associated safety and health risk factors.

* Methods for analysis of the job. The Guide provides descriptions of appropriate job evaluation methods to Identify ergonomic problems or other factors that can be controlled. Examples of the recommended methods, and statements describing their limitations and benefits are given.

* Job design techniques and control strategies. The Guide provides a review of job design methods that can eliminate or reduce worker safety or health risks, and enhance worker performance. These methods include engineering controls and job design techniques (e.g. job, workplace, and tool redesign) and administrative controls (e.g. employee training and selection).

* References and other sources of information. These are provided to give the interested reader sources for further help and consultation.

Figure 4 shows how a job analyst may enter and use the guide at various levels to obtain Information, guidance, and access to design tools.

Chapter 1

Ergonomic Issues In Safety And Productivity

1.1 Job Analyst Check List For Low-Back Pain

The focus of this section is on the control of low-back over-exertion injuries from jobs that require manual lifting. The following checklist is provided to help you determine whether or not workers may be at risk of such injury. If any of the following statements are true for the task(s) you are evaluating, then the material presented in this section will help you determine the risk of low-back injury and develop appropriate means to control it.

* Do workers use lifting postures that deviate from a near upright standing posture when performing a lift, push, or pull activity?

* Do lifts, holds, carries, pushes, or pulls, require more force than can be comfortably supplied by one hand?

* Do workers lift or carry objects that are bulky or require grasps that are not close to the body and near waist-level?

* Are lifts, pushes, or pulls performed using rapid or jerking body movements?

* Are exertions performed when standing or walking on

uneven or potentially slippery surfaces?

* Do workers lift, push, or pull objects as a member of a team?

* Are workers subjected to regular exposures to whole-body vibration (e.g. driving or riding in trucks off-road for sustained periods of time or on a repeated basis)?

* Have any of your workers experienced a low-back injury while on this job or task, or have they reported minor episodes of low-back pain that they attributed to their job activities?

* Have any workers experienced a significant low-back injury prior to working for your company?

1.2 Prevalence And Cost Of Low-Back Pain

The lower back is the most common site of musculoskeletal Injury in industry today. Low-back injuries account for about 640,000 claims per year (National Safety Council, 1986), often resulting in permanent partial or total disability. Low-back pain costs about $14 billion dollars annually in direct costs such as workers' compensation and medical payments (Akeson & Murphy, 1977). Low-back pain also produces indirect costs and significantly affects an individual's quality of life (indirect costs). Estimates of direct and indirect costs of low-back injury to U.S. industries range

from $30 billion dollars (Pope & Frymoyer, 1986) to as high as $100 billion dollars annually (Asfour, Khaiiii, Moty, Stools, & Rosomoff, 1983).

In 1981, the National Institute for Occupational Safety and Health (NIOSH) reported that over 61% of those suffering from low-back pain cited overexertion as its cause. NIOSH also reported that:

* overexertion injuries occur to about 1 out of every 20 workers each year,
* approximately 68% of all overexertion injuries involve lifting loads, while 20% involve pushing or pulling loads.

Thus, manual materials handling (lifting, pushing, and pulling) activities are associated with the development or aggravation of low-back pain in the workplace.

Within the railroad industry, overexertion injuries involving the torso (e.g., torso sprains and hernias) account for 27% of all lost-time injuries to on-duty employees and 29% of all lost-work days (McMahan & Page, 1986). The railroad crafts shown in Figure 1 accounted for only about half of all work hours from 1976 through 1985. However, their risk of a torso overexertion injury was more than 3.5 times that of office workers (control group). For example, trackmen and yardmen were 8.2 and 6.5 times more likely to incur torso overexertion injuries than office workers. These findings are attributed to differences in the physical demands among crafts.

1.4 Factors Affecting Low-Back Pain

Low-back pain may be affected by the following worker, job, and workplace environment factors:

Worker Factors Associated with Low-Back Pain

Worker Age

* The majority of low-back cases occur to individuals in their 30s and 40s (Rowe, 1969). Generally, the risk of musculoskeletal injuries (including low-back pain) increases with age.

Worker Gender

* Women, may be more susceptible to low-back pain than men performing the same physically demanding tasks (Magora, 1970). However, gender may not be an important factor when persons of equal size and strength perform the same tasks.

Worker Medical History

* The incidence of low-back pain appears to occur more often to those who previously had low-back pain. Rowe (1969) reported that 85% of low-back patients previously had intermittent episodes of low-back pain.

Worker Muscle Strength

* Chaffin and Park (1973) found that workers whose static strength capabilities were below the strength needed to do their jobs were three times more susceptible to suffering low-back injuries.

Job Factors Associated With Low-Back Pain

Horizontal Distance Between the Object and the Body

* Back stress increases as the horizontal distance between the object and the body increases.

Weight and Size of the Object

* Back stress increases as the weight of the object increases.

* Large or bulky objects can increase the horizontal distance between the body and the hands, thus increasing back stress.

Frequency of Lifting

* The frequency and severity of musculoskeletal problems increases as the lifting frequency increases (Chaffin et al., 1977).

Lifting While Twisting and Bending the Torso
(Asymmetrical Lifting)

* Workers whose jobs require bending forward (back flexion), twisting, or sideways bending are five times more likely to report low-back pain than those workers who do not flex or twist their backs during work (Punnett et al, 1986).

Workplace Environmental Factors Associated With Low-Back Pain

Uneven or Slippery Floors

* A sudden loss of balance caused by an uneven or slippery floor surfaces can cause the torso muscles to contract suddenly with great force. Falls can also cause spinal impact injuries.

Vibration

* Exposure to whole-body vibration increases one's risk of low-back injury. Truck drivers (who were exposed to vibration during driving) were 4 times more likely to suffer disc herniation than those not exposed to vibration (Kelsey, 1975).

Section 4
Guideline For Manual Lifting

This section of the guide:

1) describes the NIOSH Work Practices Guide For Manual Lifting,

2) provides a quick description on how to evaluate lifting tasks using the NIOSH guide,

3) provides examples of rifting task evaluations,

4) lists the benefits and limitations of this evaluation method, and

5) provides further information on additional tools to evaluate lifting tasks using the NIOSH Work Practices Guide.

4.1 The NIOSH Work Practices Guide For Manual Lifting

The National Institute for Occupational Safety and Health (NIOSH) sponsored the development of a lifting guideline for the design and evaluation of manual lifting tasks. It represents the first comprehensive approach to control Injuries from manual materials handling. Such injuries include low-back pain, localized muscle fatigue, and whole-body fatigue (from excessive

repetitive lifting). Lifting limits set by this guideline are based on the following considerations:

1) epidemiological - the relationship between the risk of low-back injury the weight lifted.

2) biomechanical - the ability of the physical structures of the low-back to tolerate the mechanical stress created during lifting.

3) physiological - the amount of repetitive lifting, considering both the magnitude and frequency of the lifting, than a person can due without becoming excessively fatigued.

3) psychophysical - studies of human strength capability where strength is defined as the maximum voluntary force a person is willing to exert.

Chapter 2
Job Analysis Techniques

A complete description of the assumptions and basis of the lifting guide can be found In the original NIOSH report (NIOSH, 1981).

The NIOSH lifting guide is intended for use in evaluating smooth, two handed lifts performed directly In front of the body (i.e., in the sagittal plans). Unrestricted lifting posture. good couplings (handles, shoes, floor surface), and favorable ambient environments are also assumed. It does not accurately evaluate lifting tasks involving rapid movement (i.e., highly dynamic tasks) or tasks requiring twisting and bending of the upper body. The NIOSH lifting guide is based on an equation that considers the following six lifting task variables:

* Object Weight

* Horizontal Location Of Hands At Lift Origin

* Vertical Location Of Hands At Lift Origin

* Vertical Travel Distance Of The Hands From The Origin To The Destination Of The Lift

* Lifting Frequency (i.e., Average number of Lifts Per Minute)

* The Duration Of Period Of The Lifting Task. This is the length of time lifting is performed at the lifting frequency. The guide considers two lifting period categories: occasional (1 hour or less) or entire shift (8 hours).

These lifting task variables are used in the NIOSH lifting guide to compute an "Action Limit" (AL) and a "Maximum Permissible Lift" (MPL). The AL is that weight in pounds that can be handled safety by about 99% of the male and 75% of the female populations. The MPL is that weight of lift that can be handled safely by 25% of the male and 1% of the female populations. The MPL Is three times the AL. [Restrictions]

The AL and MPL are computed as follows (refer to Figure 1):

$$AL = 90\,[6/H]\,[1-.01\,|V-30|\,][.7+3/D]\,[1-F/Fmax]$$
$$= 90\,[HF]\,[VF][DF][FF]$$

$$MPL = 3[AL]$$

Where:

AL = the Action Limit in pounds.

MPL = the Maximum Permissible Limit in pounds.

HF = horizontal factor = [6/H]

VF = vertical factor = [1 -.01 | V - 30 |]
| V-30 | = absolute or positive value of V-30

DF = distance factor = [.7 +-3/D]

FF = frequency factor = [1 - F/Fmax]

And:

H = the horizontal location (in inches) of the hands at the origin of the lift. This value must be between 6 and 32 inches, measured from the ankles. Six inches is the minimum distance objects can be hold from the body (body interference limit). And most individuals cannot reach beyond 32 inches (functional reach limit). A rule of thumb for H is (DT/2+ 6) where DT equals the horizontal width of the object (DT/2) implies that the hands grip the object at its center and 6 represents body interference limit.

V = the vertical location of the hands at the origin of the lift in inches. This value must be between 0 and 70 inches, the range of vertical reach for most people.

D = the distance from the origin to the destination of the lift in inches. This value must be between 10 inches and (80- V). For travel less than 10 inches, set D = 10 inches.

F = the frequency of lifting during the task in lifts per minute. (Set F = 0 if F is less than .2 lifts per minute)

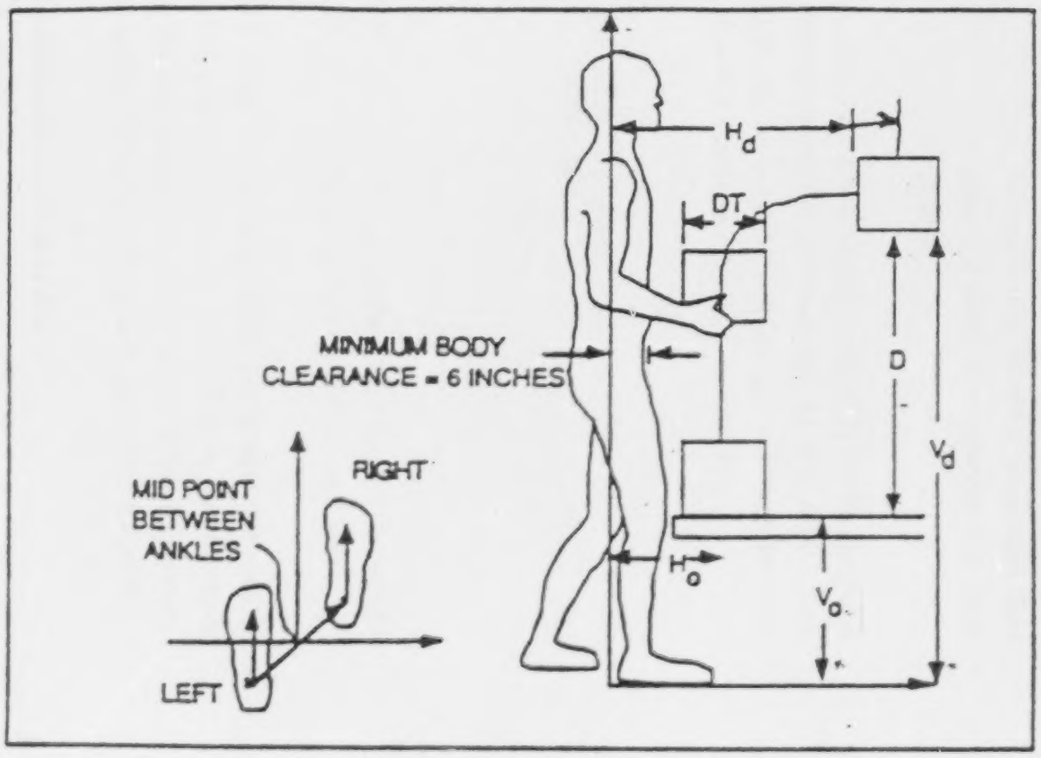


Figure 1
Illustration Of Important Lifting Task Variables.
("o" = Lift Origin, "d" = Lift Destination)
(Adapted From Keyserling And Chaffin, 1986)

Fmax = the maximum frequency, in lifts per minute, that can be sustained. This variable is selected from Table 1 below and depends upon the vertical location of the load (V) and the duration or period (P) of the lifting task.

Table 1
Fmax In Lifts Per Minute

	Avg Vertical Location (in)	
Period (P)	Standing V > 30	Stooped V <= 30
0 ≤ P ≤ 1 Hour	18	15
1 < P ≤ 8 Hours	15	12

P = the duration or period of the lifting task is assumed to be either occasional (less than one hour) or continuous (for eight hours).

A simple lifting task severity index (SI) can be computed for tasks whose weight falls between the AL and MPL. This index, which can be used lo help assign priorities to tasks requiring remedial action, is calculated as follows:

$$SI = \frac{(WT - AL)}{(MPL - AL)} x100$$

where:

WT = Weight of the object lifted. The weight must be between the AL and MPL.

The larger the severity index, the greater the risk of injury the task presents. A severity index close to zero describes a task that slightly exceeds the Action Limit. While the severity index approaches 100 as the lifting task approaches the MPL.

4.2 Recommended Lifting Limits

The NIOSH Action Limit (AL), as computed above, describes a lifting task that:

* would be within the strength capabilities of 75% of all women and 99% of all men;

* would produce about 770 pounds of compression in the lower back (L5/S1 disc) which can be tolerated by most young, healthy workers; or

* would require an energy expenditure of about 3.5 kilocalories per minute for most individuals, which is within the endurance capabilities of about 75% of all women and 99% of all men.

The NIOSH Maximum Permissible Limit (MPL), as computed above, describes a lifting task that:

* would be within the strength capabilities of less than 1% of all women and 25% of all men.

Section 2

Job Design For Manual Materials Handling

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2.7 Make Containers As Compact As Possible 7

2.8 Orient Container Grips To Provide A Neutral Wrist Posture 9

2.9 References 14

This section presents a summary of ways you can design or redesign tasks involving manual materials handling to minimize the risks of over-exertion injuries. You may wish to refer to the following illustration of the basic lifting parameters as the discussion proceeds.

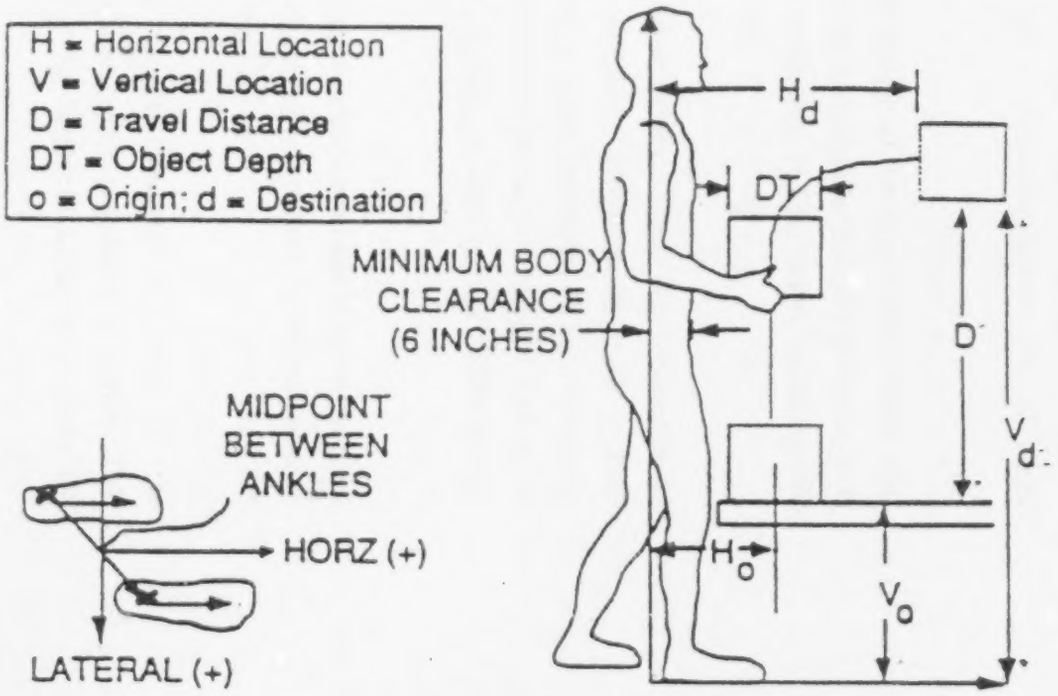


Figure 1
Illustration Of Basic Lifting Factors
(Adapted from Keyserling & Chaffin, 1986).

2.1 Summary Of Job Design Recommendations

- Minimize the horizontal distance (H) between the body and the object being handled. Keep the object as close to the body as possible during all materials handling activities.

- Minimize bending and reaching by keeping the vertical location (V) of materials near knuckle height (about 30 inches for an average man). Whenever possible design jobs so that objects may be lifted and placed at or near knuckle height. Avoid lifting objects from the ground or above shoulder height.

- Minimize the vertical travel distance (D) that objects must be lifted from the origin and destination of the lift

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* Minimize the frequency and duration of lifting (F) when possible. But carefully evaluate the trade-offs between frequency, weight of object, and duration of lifting before changing either one of these parameters.

* Minimize the weight of the object being lifted. But evaluate the effect upon other task components, such as required frequency of lift, before reducing the object's weight.

* For two-handed lifting, make the container as compact as possible. Minimize its depth without adversely compromising visibility or ease of lifting. Use the NIOSH Guideline for Manual Lifting to evaluate the handling of containers of different sizes and shapes.

* Container grips should be oriented to allow the wrist to assume a neutral (i.e., not bent or twisted) posture throughout the lift.

After reviewing the recommendations for each of the components, you should observe them together as a system. This can easily be done using the NIOSH Guide to evaluate the potential task redesign.

2.2 Minimize The Horizontal Location (H) At Lift Origin

The horizontal location of the object represents the distance between the body and the object held in the hands. Compression upon the low-back increases as this distance increases, increasing the risk of low-back pain.

The muscle strength necessary to perform lifting tasks also increases as the horizontal distance (H) increases. Tasks that require excessive muscle strength, if performed repeatedly, may produce localized muscle fatigue and discomfort. Common locations of fatigue include the low-back and shoulder regions.

You can minimize the horizontal distance in several ways:

* Clear obstructions between the worker and the object

* Store frequently lifted heavy, bulky objects at about knuckle height (about 30 inches)

* Reduce the depth of the object being lifted

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS P. HEDDEN,
Plaintiff,

vs. Civil Action No.: 93-5640

NATIONAL RAILROAD PASSENGER CORPORATION, Judge Reed
Defendant.

PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL

AND NOW, comes the plaintiff, Thomas P. Hedden, by and through his undersigned counsel, and files the following Motion for Voluntary Dismissal Pursuant to FRCP 41 (a)(2):

1. Plaintiff filed this action seeking to recover damages under the Federal Employer's Liability Act for injuries suffered during the course and scope of his employment with the defendant in August of 1992.

2. Plaintiff has alleged that he suffered a serious back injury while attempting to remove a railroad tie from beneath the track rails, and that he was provided with insufficient warning, instruction, and assistance.

3. During the pendency of discovery of this case, plaintiff submitted the following Interrogatory and Request for Production of Document to the defendant, with the answer thereto being indicated below:

> Number 65: Is the defendant aware of the application of any American Association of Railroads specifications, studies, complaints, or recommendations to the activities of the plaintiff at the time of the incident in suit? If so, please describe this defendant's understanding of any such applicable specifications. If not, please state any investigation or inquiry undertaken by this defendant at any time to determine the applicability of said specifications.
>
> ANSWER: To be supplied, if any. The FRA MW-1000 track maintenance standards require the renewal of cross ties which have become deteriorated or unsafe in order to maintain track safety and compliance with federal standards. (See Exhibit "A".)

4. Plaintiff subsequently discovered, in connection with unrelated litigation against a different railroad, that the Association of American Railroads had issued an "ergonomics guide", and that at least one employee of Amtrak, Dan Sheehan, had attended an ergonomic workshop regarding "low back pain

and manual materials handling" in October of 1990 (see page 418 of Exhibit "B" "AAR Ergonomics Guide"). This ergonomic guide specifically states that it is designed "to help you (the railroad) understand low back pain and its causes" (page 434 of Exhibit "B"), including an analysis of risks such as "do workers use lifting postures that deviate from a near upright standing posture when performing a lift, push, or pull activity", "do lifts, holds, carries, pushes, or pulls require more force than can be comfortably supplied by one hand?", "are lifts, pushes, or pulls performed using rapid or jerking body movements", and "do workers lift, push, or pull objects as a member of a team". (See page 435 Exhibit "A".)

5. This presentation apparently went on to note that over 25% of railroad injuries are overexertion injuries of the torso such as that suffered by the plaintiff (Exhibit "B", page 436).

6. This guide then goes on to provide specific methods for analysis of the job and its risks, as well as job design techniques to mitigate the risks of injury from such work.

7. The type of work being performed by the plaintiff at the time of the incident in question is precisely the type of information which is described in this material.

8. This information from the Association of American Railroads was, on its face, "reviewed" by Amtrak's superintendent of safety, field operations, Dan Sheehan, and attended by him in October of 1990.

9. The defendant did not disclose the existence of this document during discovery.

10. Plaintiff further believes that there is additional information related to this document which has not been produced during the course of discovery.

11. In addition, plaintiff submits that he requires the opportunity to perform further discovery into the background and application of this AAR Ergonomic material and its application by Amtrak.

12. These issues are directly relevant to the matters in suit, and substantially affect plaintiff's right of action.

13. Plaintiff requests this Honorable Court to enter an Order of Voluntary Dismissal without prejudice pursuant to FRCP 41(a) (2).

14. The defendant will suffer no legal prejudice as a result of this dismissal.

15. The efforts and expenses expended by both parties in connection with the instant action would be equally applicable to a subsequent action to be brought by the plaintiff.

16. The statute of limitations on the underlying cause of action does not expire until August of 1995, such that the claim, if reinitiated after dismissal, would still be timely brought.

17. No counterclaim has been filed by the defendant in connection with this case.

18. The need for plaintiff to dismiss the case at this time is based upon the failure of the defendant to reveal the existence of information from the American Association of Railroads during the pendency of discovery.

19. Plaintiff previously sought leave of this Honorable Court to enlarge discovery to allow this line of inquiry to proceed in connection with this pending litigation, however this request was denied by Order of this Court entered January 12, 1995.

20. In the January 12, 1995 Order plaintiff was provided with approximately three weeks to provide expert reports.

21. Due to the fact that plaintiff did not have the opportunity to engage in discovery regarding this AAR material, nor further develop this line of inquiry, plaintiff has been unable to provide an ergonomic expert's report within the period time prescribed by prior Order of this Court.

22. Voluntary dismissal of a case should be granted where the defending party will not suffer any legal prejudice, and any inconvenience associated therewith can be rectified by appropriate terms and conditions to be applied by this Court to the Order of Dismissal.

WHEREFORE, plaintiff's undersigned counsel respectfully requests this Honorable Court to enter an Order of Voluntary Dismissal without prejudice in the above-captioned case. Plaintiff incorporates herein his Brief in Support of Plaintiff's Motion for Voluntary Dismissal.

Respectfully submitted,
ROBERT PIERCE AND ASSOCIATES
By: /s/
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(2)

Supreme Court, U.S.
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No. 96-246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS HEDDEN,

Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CORRECTED RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

LIST OF INTERESTED PARTIES

The petitioner is Thomas Hedden.

The respondent is currently identified in the caption as National Railroad Passenger Corporation. Respondent does business as Amtrak. Christopher J. Hoare, Esquire, of Marshall, Dennehey, Warner, Coleman & Goggin, is counsel of record for respondent.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that this court deny the Petition for Writ of Certiorari seeking review of an Opinion of the United States Court of Appeals for the Third Circuit. The Opinion of the Third Circuit Court of Appeals was filed on May 12, 1996 (App. 18a) but was not published.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari since there has been no showing that this case is of such imperative public importance as to justify deviation from normal appellate practice and to require the immediate determination by this court. See 28 U.S.C. §2101(e). The Third Circuit Court of Appeals' Opinion in this case is not in conflict with the decision of any other United States Court of Appeals. The Third Circuit Court of Appeals' Opinion has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power. In addition, the Third Circuit Court of Appeals' Opinion does not conflict with the relevant decisions by this court on the federal law in question.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner first filed this case in the Court of Common Pleas of Allegheny County, Pennsylvania on March 25, 1993 in the case of Thomas P. Hedden v. Amtrak (CCP Allegheny County GD93-5251). Respondent filed Preliminary Objections to venue in the Court of Common Pleas of Allegheny County, Pennsylvania. Respondent's Preliminary Objections to venue were pending at the time petitioner voluntarily dismissed his state court action and refiled this case in the United States District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania on October 25, 1993. Petitioner had alleged injury occurring while at work in a rail yard in Long Island City, Queens, New York. Petitioner alleged that respondent violated the Federal Employers Liability Act, 45 U.S.C. §51 ("FELA").

From October 25, 1993 when petitioner refiled his suit in the United States District Court until January 11, 1995, respondent had engaged in discovery, retained an expert witness, prepared for trial, prepared Motions for Summary Judgment, Pre-Trial Memoranda, Motions in Limine and Answers to petitioner's various Motions. The United States District Court denied petitioner's Motion for Voluntary Dismissal on January 11, 1995.

> The plaintiff has failed to show favorable terms under which his request for approval of his voluntary dismissal may be conditioned, it is hereby ordered that the Motion is denied.

A copy of the court's January 11, 1995 Order denying petitioner's Motion for Voluntary Dismissal is attached at App. 27(a).

Petitioner appealed, inter alia, the District Court's denial of his Motion for Voluntary Dismissal to the United States Court of Appeals for the Third Circuit. In its

Opinion, the Third Circuit Court of Appeals affirmed the District Court's denial of petitioner's Motion for Voluntary Dismissal (App. 22(a)). The Third Circuit Court of Appeals found compelling the fact that petitioner had previously voluntarily dismissed his lawsuit where it had been filed in state court. The Third Circuit Court of Appeals also noted the period of a year and three months during which the respondent had engaged in discovery, retained an expert witness, prepared for trial, prepared Motions for Summary Judgment, Pre-Trial Memoranda, Motions in Limine and Answers to petitioner's Motions.

> It is thus clear that the defendant would suffer prejudice had the District Court allowed yet another voluntary dismissal this far into the litigation. Thus, we do not think that the District Court abused its discretion in denying the Motion for Voluntary Dismissal.

(App. 22(a)).

The United States Court of Appeals for the Third Circuit affirmed all of the rulings of the District Court below.

B. Correction of Misstatements in the Petition.

The Opinion of the United States Court of Appeals for the Third Circuit correctly sets forth the facts of this case. (App. 18(a) - 25(a)). The Opinion accurately reflects the Third Circuit's careful consideration of the case law and procedural history of this case in affirming the District Court's denial of petitioner's Motion for Voluntary Dismissal. In the interest of making this Brief truly brief, respondent respectfully directs this court's attention to the Appellate Court's Opinion.

Pursuant to United States Supreme Court Rule 15.1, respondent brings the misstatements of facts contained in the Petition to the court's attention.

Petitioner misrepresents to this court that the events from which petitioner's alleged injuries arose occurred in

eastern Pennsylvania. (Petition at p. 5.) Petitioner was actually working in Long Island City, Queens, New York, at the time he alleges he was injured.

Petitioner further states that petitioner was injured on August 11, 1992 while pulling a heavy railroad tie from a bed of gravel and mud underneath a railroad track rail during the course and scope of his employment. Actually, petitioner testified at trial that he was not sure whether his injury occurred while he was pulling the old railroad tie out from beneath the rail or carrying it to the side of the tracks. Petitioner continued working and inserted a brand new tie underneath the same rail before complaining to anyone.

Petitioner states that there was evidence to suggest that machines were available in the area where plaintiff was employed that could be used to aid in the removal of railroad ties but petitioner's supervisor, Joseph Hoffman, did not use the equipment available to the crew on the day

in question. On the contrary, mechanized equipment was not practical at the location in question. Testimony at trial supported the decision to remove ties in two-man teams because the use of mechanized equipment would necessitate removing a busy track from service.

Petitioner incorrectly suggests that respondent concealed an AAR "ergonomic study" from petitioner although petitioner's Interrogatory No. 65 would have described such a study with sufficient particularity as to require respondent to disclose it. (Petition at pp. 5-6.) On the contrary, respondent did not conceal any document from petitioner, particularly documents that were not generated by the respondent but were generated by a third entity, the American Association of Railroads. Respondent in no way interfered with petitioner's access to the records of a third party. Respondent was not aware of a study that apparently was reviewed by one of its employees. (Petitioner's Interrogatory.) The District Court correctly

identified the lack of prejudice to the petitioner when it ruled that petitioner had received the study in plenty of time to explore its content, interpret its meaning and retain an expert to introduce at the time of trial. Petitioner failed to demonstrate the role of the respondent in interfering with petitioner's access to this document or demonstrate why more discovery was required. Petitioner did not subpoena the respondent's employee to trial and petitioner did not present an expert at trial to introduce the study into evidence.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENT OF THE DISTRICT COURT AND ITS AFFIRMANCE BY THE COURT OF APPEALS ARE IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT.

Petitioner has misapplied the decisions of this court and the various Court of Appeals in order to argue that the previous decisions rendered in this case are inconsistent with established case law. Petitioner, dissatisfied with the result below, asks this Honorable Court to "second guess the Third Circuit Court of Appeals so that he may attempt once again to recover."

Petitioner's Brief raises no important question of constitutional law or presents any compelling conflict that requires this Honorable Court's supervisory instruction.

Petitioner presents no new issue of review that was not adequately presented and ruled upon by the District Court and the Third Circuit Court of Appeals below. By simply repeating the averments advanced before, the

petitioner has not made the requisite showing that the Third Circuit Court of Appeals made an erroneous factual finding or the misapplication of a properly stated rule of law. Supreme Court Rule 10(c).

This Honorable Court has refused in the past to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error. Goodman v. Lukens Steel Co., 482 U.S. 666, 107 S.Ct. 2617 (1987).

The Third Circuit Court of Appeals properly stated the Federal Rule of Civil Procedure 41 when it considered the District Court's denial of petitioner's Motion for Voluntary Dismissal. The Third Circuit Court of Appeals found that the District Court did not abuse its discretion when it denied petitioner's Motion for Voluntary Dismissal. The Third Circuit Court of Appeals' Opinion noted the length of time that had passed and the various preparations that had been made by the respondent toward

trial between the time petitioner refiled his cause of action in the District Court and then made application to dismiss this case voluntarily. It would require this court's review of factual findings by the Third Circuit Court of Appeals.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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